POLAR LIGHT SDN BHD & ANOR

v.

THE OWNERS OF THE SHIP "MV SOON YU"

HIGH COURT SABAH & SARAWAK, MIRI
SULAIMAN DAUD JC
[ADMIRALTY IN REM NO: MR3-1994]
17 NOVEMBER 2000

SHIPPING: *Carriage of goods - Contract of carriage - Loss of goods - Whether an outward manifest a similar document of title as bill of lading - Whether defence of peril of the sea available to defendant - Whether damage or loss due to act of God - Findings on the grounding of the vessel - Whether due to human negligence - Whether plaintiffs entitled to damages for all goods lost - Merchant Shipping (Implementation of Convention relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960, reg. 2, 4 - Articles II, III, IV of Rules Relating to Bills of Lading in Schedule*

The plaintiffs in this case claimed damages against the defendant for the loss of cargo comprising 38 crates of plywood. The lost cargo were part of the consignment of plywood arranged by the first plaintiff to be shipped on board the defendant's vessel from Miri to the second plaintiff in Labuan. In the first shipment seven crates went missing and in the second shipment another 31 crates which were shipped on board the same vessel, also perished. The plaintiffs pleaded negligence on the part of the defendant in managing the cargo before or during the course of voyage or when the vessel was grounded or during salvage operation. The defendant contended that the defendant's case came under the exceptions of the rule of strict liability by virtue of the Merchant Shipping (Implementation of Convention relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960 ('the Regulations'). The defendant further submitted that the defendant was exempted from liability by virtue of art. IV of the Rules Relating to Bills of Lading ('the Rules') as set out in the schedule to the Regulations.

The issues that arose were: (i) whether the outward manifest was a similar document of title as that of a bill of lading and accordingly whether the defence of "peril of the sea" was available to the defendant; (ii) whether the damage or loss was due to the act of God; and (iii) whether the seven crates of plywood which were short shipped in the first shipment were on board the said vessel when it ran aground.

Held:

[1] The court could not agree with the defendant's contention that an outward manifest is a similar document of title as that of a bill of lading. For the said Rules to apply there must be a contract of carriage covered by a bill of lading or any similar document title. For a document to be a similar document of title to that of a bill of lading the said document must satisfy the following requirements: firstly it must be issued by the carrier to the shipper, secondly the document must contain the name of the shipper and the consignee and the description of the goods to which the contract of carriage relates and thirdly there must be acknowledgment by the carrier of the receipt of the goods specified therein. No such characteristic or attribute was present in the outward manifest relied on by the defendant. (p 181 c-f)

[1a] The carriage of the crates of plywood was not a contract of carriage within the meaning of the Rules, to which the Regulations apply. The defendant was therefore precluded from pleading "peril of the sea" as a defence. (p 181 g)

[2] The grounding of the vessel was not an accident which was due to natural cause, directly and exclusively without human intervention which could not by any amount of human care and skill have been resisted. The grounding of the vessel was also not a direct consequence of the strong wind and rough sea but was also attributed to the master's negligence in manoeuvering the said vessel and the negligence of the salvors in carrying out the salvage operation after the vessel was grounded. (pp 183 g-h & 184 h)

[3] From the outward manifest it was obvious that there were only 31 crates of plywood consigned to the second plaintiff. The plaintiff had failed to prove that the seven crates of plywood that were short-shipped during the first shipment were on board the vessel that was grounded. The plaintiff was only entitled for damages in respect of the 31 crates of plywood. (p 185 a-b)

[Plaintiff awarded damages for 31 crates of plywood with interest; costs to the second plaintiff to be taxed unless otherwise agreed.]

Case(s) referred to:
Hill v. Scott [1895] 2 QB 371 ***(refd)***
Liver Alkali v. Johnson [1874] LR 9 Ex 338 ***(refd)***
Luddit & Ors v. Ginger Coote Airways Ltd [1947] 1 All ER 328 ***(refd)***
Sarawak Electricity Supply Corp v. MS Shipping Sdn Bhd [2000] 2 CLJ 256 ***(refd)***

Legislation referred to:
Merchant Shipping (Implementation of Convention relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960, reg. 2, 4
Articles I, II, III, IV of the Rules Relating to Bills of Lading in Schedule

Other source(s) refered to:
Halsbury's Laws of England, 4th edn, vol 9, p 323
Halsbury's Laws of England, 4th edn, vol 41, para 946
Halsbury's Laws of England, vol 43, p 282
John Wilson, *Carriage of Goods By Sea*, 2nd edn, pp 249, 250

For the plaintiff - Un Peir Liang; M/s Jimmy HT Wee & Co
For the defendant - KY Lin (Louis Achok); M/s Kadir, Wong, Lin & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Sulaiman Daud JC:
The plaintiffs claim damages against the defendant in the sum of RM70,702 together with interest thereon for the loss of cargo comprising 38 crates of plywood. The lost cargo were part of the consignment of plywood arranged by the first plaintiff to be shipped on board the defendant's vessel, M.V. Soon Yu, from Miri destined for the second plaintiff at Labuan. There were two such shipments. In the first shipment the first plaintiff forwarded 44 crates of which 37 crates were received by the second plaintiff leaving a short shipment of 7 crates. Another 31 crates were shipped on board the same vessel which set sail from Miri to Labuan at 0100 hours on 17 January 1994. When the vessel departed Miri on that day the weather was normal but at about 1430 hours the vessel encountered rough sea. The master of the vessel steered the vessel towards the shallow water where she ran aground at about 1830 hours approximately 0.5 kilometer off the coast of Lumut, Bandar Seri Begawan. The master informed the owner of the vessel about the incident at about 2345 hours on the same day. The first salvage operation was carried out on 28 January 1994 where the salvor Yang Yang Shipping only managed to tranship the on-deck cargo to the salvage barge. During such operation the aft hatch covers were opened to facilitate the discharge of other cargo, including the plywoods, in the cargo hold. As the vessel and the cargo hold were constantly swamped by heavy

breakers, the salvor suspended further salvage operation at about 1900 hours until daylight the following day. Unfortunately during the night the consignment of plywood in crates stowed in the vessel's cargo hold were swept away.

The plaintiffs allege that the defendant, in breach of the agreement entered between them or of its duty as bailee, failed to deliver 38 crates of plywood to the second plaintiff or to return the same to the first plaintiff. The plaintiffs also pleaded negligence on the part of the defendant in handling, storing or managing the cargo before or during the course of the voyage or when the vessel was grounded or during salvage operation. The defendant specifically relied on the defence of peril of the sea or alternatively of the act of God.

The facts of the case as set out above gave rise to following issues for determination, that is firstly whether the defendant can resort to the defence of peril of the sea; secondly, if such defence is available to the defendant, whether the loss of such plywoods was attributed to such peril or alternatively, attributed to the act of God; and thirdly whether the seven crates of plywood which were short-shipped in the first shipment were on board the said vessel when it ran aground.

Liability Of A Common Carrier Of Goods

It is not disputed that the defendant operates the vessel M.V. Soon Yu for the carriage of goods for reward and is therefore a common carrier. The liability of a common carrier of goods has long been settled. Lord Wright in delivering the judgment of the Judicial Committee of the Privy Council in the case of *Luddit and Others v. Ginger Coote Airways Ltd.* [1947] 1 All ER 328 stated at p. 329 as follows:

> By the custom of the realm a common carrier of goods was at common law 'bound to answer for the goods at all events ... The law charges this person thus entrusted to carry goods against all events but acts of Gods, and of the enemies of the King' (LR 4 QB 379 at p. 382).

In the case of *Hill v. Scott* [1895] 2 QB 371, Lord Russel of Killowen CJ, in discussing the liability of a common carrier, stated at p. 376:

> ... every shipowner who carries goods for hire in his ship, whether by inland navigation, or coastways, or abroad, undertakes to carry them at his own absolute risk, the act of Gods or the Queen's enemies alone excepted, unless by agreement between himself and a particular freighter, on a particular voyage, or particular voyages, he limits his liability by further exceptions.

The shipowner's liability as a common carrier is further explained in *Halsbury's Laws of England,* vol. 43 at p. 282 as follows:

> If goods are shipped in a general ship without any express contract being made or under any contract to which the Carriage of Goods by Sea Act does not apply, and which does not contain any stipulations relieving the shipowner from liability for loss of or damages to the goods, he impliedly undertakes to carry them at his own absolute risk.

Having stated the law as to the shipowner's liability as a common carrier I will now proceed to consider the defence of the defendant as pleaded. The question is whether in the contract for such carriage made orally between the parties there was any stipulation, express or implied, the effect of which was to limit the defendant's liability. It is not disputed that such carriage was neither covered by a bill of lading nor an insurance policy. The learned counsel for the plaintiffs contended that there is no such stipulation and as such he submitted the defendant can only resort to the defence of act of God.

The learned counsel for the defendant contended that the defendant's case in the present action comes under the exceptions of the rule of strict liability by virtue of the Merchant Shipping (Implementation of Convention relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960 ("the 1960 Regulations"). By reason thereof he submitted that the defendant was exempted from liability by virtue of art. IV of the Rules Relating To Bills of Lading ("the said Rules") as set out in the Schedule to the 1960 Regulations because the loss of the cargo was due to very rough sea and bad weather which according to him constitute the defence of the peril or the danger of the sea. The learned counsel for the plaintiffs on the other hand submitted that the 1960 Regulations did not apply in the present action because the carriage was not subject to any bill of lading and that the outward manifest in respect of the goods was not "a similar document of title" within the meaning of the said Rules. The question is whether or not the defence of peril or danger of the sea as provided in the 1960 Regulations and the said Rules apply to the present action.

Whether The Defence Of "Peril Of The Sea" Available To The Defendant

The issue raised involves consideration of certain related provisions of the 1960 Regulations and the said Rules. Regulation 2 thereof provides that subject to the provisions of this Part, the Rules set out in the Schedule shall have effect to and in connection with carriage of goods by sea in ships carrying goods from any port in Sarawak to any other port whether

in or outside Sarawak. Regulation 4 requires every bill of lading or similar document of title issued in Sarawak which contains or is evidence of any contract to which the Rules apply to have an express statement that it is to have effect subject the provisions of the Rules as applied to this Part. What is the effect of this reg. 4. Whether for such Rules to apply there must be endorsed on such bill of lading or such similar document the express statement as stipulated in the said reg. 4. Upon perusal thereof in my opinion such provisions are mere directive requiring every bill of lading or such document of title to contain such statement without imposing any penalty or adverse effect in case of non- compliance. I am also of the view that the absence of such statement from any bill of lading or other similar document will not in any way deprive the holder thereof from enjoying the protection or right and immunities against risk as provided under the said Rules. This interpretation is relevant to one of the issues raised by the learned counsel for the plaintiffs which will be dealt with in the course of this judgment.

The Rules referred to in the 1960 Regulations and as provided in the Schedule thereto is "the Rules Relating To The Bills Lading". Article II of the Rules provides that under every contract of carriage of goods by sea the carrier, in relation to the loading , handling, stowage, carriage, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth. Such responsibilities and liabilities are provided in art. III of the Rules and the rights and immunities are provided in art. IV thereof. The provisions of the said art. IV in so far as relevant to the present action are contained in para. 2(c) and (d) thereof and are as follows:

> 2. Neither the carrier nor the ship shall be responsible for loss or damages arising or resulting from –
>
> (a) ...;
>
> (b) ...;
>
> (c) perils, danger and accidents of the sea or other navigable waters;
>
> (d) act of God;
>
> (e) ...;

As provided in art. 2 of the Rules the right and immunities set forth above is only applicable in relation to contract of carriage of goods by sea (emphasis is mine). The expression "contract of carriage" therein is defined in art. I of the Rules and is as follows:

> "contract of carriage" **applies only to contracts of carriage covered by a bill of lading or any similar document of title** (emphasis added), in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar documents as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

The learned counsel for the defendant having admitted that the carriage of the said crates of plywood was not covered by a bill of lading argued that the outward manifest in respect of such goods is a document of title similar to that of the bill lading. He further submitted that such manifest is an acknowledgement of titles to such goods wherein the name of the shippers and consignee are clearly stated. Such document is also recognised as a document of title to such goods and has to be submitted to the customs department before the vessels departed Miri. The learned counsel cited the case of *Sarawak Electricity Supply Corp v. MS Shipping Sdn Bhd* [2000] 2 CLJ 256 where one of the points at issue was whether a shipping order is a document of title. It was held that such shipping order was as good as being a document of title for without it the plaintiff, being the consignee as well as the shipper, would not be able to claim the cargo from the defendant shipping company. In support of his finding Ian Chin J stated at p. 263:

> This is especially so when a shipping order also has the other important attributes of a bill of lading like, an acknowledgement by the shipping company that the cargo had been received in apparent good condition and that it had been shipped by the consignor. It also, just like a bill of lading, states the destination and description of the cargo.

What then is a bill of lading. *Halsbury's Laws of England* (4th edn) vol 41, at para 946 defines bill of lading as follows:

> A bill of lading is a receipt for goods delivered to and received by a ship, signed by the person who contracts to carry them, or his agent and evidencing the term of the contract of carriage under which the goods have been so delivered and received ....

In *Modern Bills of Lading,* 2nd edn, Blackwell Law, the function of bill of lading are summarised as follows:

> The bill of lading continues to serve its original function, as receipt from the carrier for the goods. If it is a clean shipped bill it will also state that the goods have been loaded aboard his vessel, in apparent good order and condition ... .

From being a receipt from the carrier for the goods, the bill of lading evolved into a document of title (so long as it is expressly made negotiable by the shipper). Negotiability became an important feature of the document. As a document of title:

(a) it represents the goods to make it possible for the buyer to deal with the goods at sea;

(b) it transfers constructive possession of the goods;

(c) it may operate to transfer property in the goods.

From my understanding on the bill of lading as illustrated above, I cannot with respect agree with the contention of the learned counsel for the defendant that an outward manifest is a similar document of title as that of a bill of lading. A manifest, in the case of merchant vessel, is a list of goods making up her cargo with the name of the shippers (see *Jowitt's Dictionary of English Law*). For the said Rules to apply there must be a contract of carriage covered by a bill of lading or any similar document of title. In my view for a document to be a similar document of title to that of a bill of lading the said document must satisfy at least the following requirements, that is to say, firstly it must be issued by the carrier to the shipper, secondly the document must contain the name of the shipper and the consignee and the description of the goods to which the contract of carriage relates and thirdly there must be acknowledgment by the carrier of the receipt of the goods specified therein. It is clear to me that the shipping order referred to in the last mentioned case has all the attributes of a bill of lading for the learned judge to arrive at the finding that he made. No such characteristic or attribute is present in the outward manifest relied on by the defendant. There is also no evidence adduced before this court to show that the outward manifest was issued by the owner of the vessel to the plaintiffs as a document of title.

For the reasons aforesaid, it is my finding that the carriage of the crates of plywood in this action is not a contract of carriage within the meaning the said Rules, to which the 1960 Regulations apply. The defendant is therefore precluded from pleading peril of the sea as a defence. The learned counsel for the plaintiff further contended that even if the outward manifest is a similar document of title, the said Rules are still not applicable since no endorsement as required in reg. 4 of the 1960 Regulations is made thereon. It is not necessary for me to dwell on this contention further as I have already given my finding thereon while discussing the effect of the said reg. 4 earlier in the judgment.

Whether The Damage Or Loss Is Due To Act Of God

Having made the aforesaid finding I will consider the alternative defence of the defendant. In the absence of any express stipulations in any contract a carrier is allowed to invoke the four common law exceptions of the act of God, Queen's enemies, inherent vice, and a general average sacrifice. The exception of the act of God can only be invoked where the damage or loss is solely attributable to natural causes independent of any human intervention. A common carrier is not liable for any accident as to which she can show that the accident was due to the natural causes directly and exclusively, and not to human intervention and that it could not have been prevented by any amount of foresight, pain and care reasonably to be expected from him (see John Wilson, *Carriage of Goods By Sea*, 2nd edn, Pitman Publising at pp. 249 and 250). In the case of *Liver Alkali v. Johnson* [1874] LR 9 Ex 338, where a vessel ran aground in a fog without any negligence of the shipowner, it was held that the defence of the act of God was not available and the fact that the shipowner is in no way negligent was not material.

In the legal sense the term, the act of God may be defined as an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against, or more accurately as an accident (1) due to natural causes directly and exclusively without human intervention (2) which could not by any amount of ability have been foreseen, or, if foreseen, could not by any amount of human care and skill have been resisted (see *Halsbury's Laws of England*, 4th edn, vol 9 at p. 323.)

Having stated the law I will relate it to the facts and circumstances of the case to determine whether the defendant can succeed in the defence of act of God. With regard to the grounding of the vessel, the learned counsel for the plaintiff submitted that the accident is not due to an act of God because there were human elements involved which contributed to the grounding of the vessel and ultimately to the loss of the plywoods. The weather was not the sole cause. The learned counsel argued that there was no log book referred to anywhere to record the contemporaneous account of the weather condition. The only witness to the weather condition is DW2, the master of the vessel, who testified that there was "heavy wave and strong wind" in his examination-in-chief. In the maritime consultant report it was reported that the wave was about six feet to eight feet and wind up to Force 4 on Beaufort Scale. In cross examination he testified that Force 4 wind has a speed of about 40 nautical miles per hour. The learned counsel submitted such assertion was not consistent with that specified in the *New Encyclopedia Britannica* which clearly sets out that

Force 4 wind is a moderate breeze with a wind speed of 11-16 nautical miles. The learned counsel further contended that DW2 had ample time to take precautionary measures or to alter course because the change in the weather was gradual. It is reasonably to be expected for DW2 at that time to resist the weather but instead he chose to proceed with the journey without taking any precautionary measures until the vessel cannot move further due to heavy wave and strong wind.

The learned counsel for the defendant on the other hand submitted that the cause of the accident was exclusively due to strong wind, heavy waves which are the natural causes. The vessel was listed 40 degrees and she was in immediate danger of sinking. In order to save lives of the crews, the master of the vessel had no other option but to divert the vessel towards the shallow water where it was grounded. The learned counsel submitted that it cannot be said that the grounding of the vessel was partly attributed by the fault or neglect of the master since at the time he diverted the vessel towards the shallow water she was already in an immediate danger of sinking. It was his contention that the grounding of the vessel was solely attributed to the heavy waves and strong wind.

Finding On The Grounding Of The Vessel

DW2, the master of the vessel, testified that he encountered heavy sea at about 12 nautical miles from the beach but he still proceeded with the voyage until the vessel cannot move further. He also testified that the weather started to change at noon and got worse at 1400 hours and when he noted that the vessel was in danger of sinking and for safety of all concerned he steered the vessel towards the shallow water where it was grounded 0.5 nauticle miles from the dry shore. Based on the evidence before me, it is my finding that the grounding of the vessel is not an accident which is due to natural cause, directly and exclusively without human intervention which could not by any amount of human care and skill have been resisted. The change in the weather condition is gradual and it is reasonably to be expected from DW2 to resist the change in the weather by steering the vessel towards the shallow water off the coast when the weather is reasonably expected to get worse. Any reasonable master would immediately change the course of the vessel and steer towards safe water as soon as the weather condition started to change for the worse. I am also of the view that the grounding of the vessel is also not the direct consequence of the strong wind and rough sea but was also attributed to the act of DW2 in manoeuvering the vessel. The fact that he had never performed a vessel-grounding manoeuvre before or had any training in such manoeuvre further fortified my finding that the grounding of the vessel was partly attributed to the master's negligence in handling and maneuvering

the vessel in such weather condition. On the Force 4 wind I accepted the interpretation as submitted by the learned counsel for the plaintiff that it is only a moderate breeze with a wind speed of 11-16 nautical miles per hour.

On the salvage operation, it is also my finding that there is a chain of human intervention and action which led to the loss of the crates plywood. There were such act or measures which could have been reasonably carried out by the salvors to prevent the loss of the plywoods during the salvage operation. DW3 testified that after the deck cargo were removed on 28 January 1994 the hatch covers were opened to facilitate the discharge of other cargo, including the plywoods, in the cargo hold. However due to rough sea the salvage operation cannot be continued but had to be suspended until daylight the following day. According to DW3 he had put back the hatch covers in place when the salvage operation was suspended for the day and covered the same with tarpaulin cloth which was fastened with rope. It is without doubt that when DW3 put back the hatch covers on that day the crates of plywood must necessarily be in the cargo hold together with other cargo therein as no plywood was seen to have been washed away therefrom when the hatch covers were opened. What could have caused the crates of plywood in the cargo hold to be washed away during the night after the first day of the salvage operation. It is obvious to me that the crates of plywood must have escaped from the cargo hold after its hatch covers were forced opened by the strong wave during the night when the salvage operation was suspended. DW3 who closed the hatch covers should have foreseen such a possibility if the hatch covers were not properly secured and fastened to their original position after they have been opened. It must be clear to him that there was strong waves and unless the aft covers were properly fastened and secured to withstand such bad weather he could have foreseen that they could be ripped open and cause the escape of the cargo in the cargo hold. In other words such escape could have been prevented or resisted had DW3 used reasonable care and skill in securing and fastening the hatch covers after they were opened.

Accordingly it is my finding that the loss of the crates of plywood on board the defendant's vessel M.V. Soon Yu was the direct consequence of the master's negligence in manoeuvering the said vessel and the negligence of the salvors in carrying out the salvage operation after the vessel was grounded.

Whether The Seven Missing Crates Were On The Grounded Vessel

From the outward manifest it is obvious that there were only 31 crates of plywood consigned to the second plaintiff. The plaintiff has failed to prove that the 7 crates of plywood that were short-shipped during the first shipment (voyage 1/94) were on board the vessel M.V. Soon Yu that was grounded (voyage 2/94). As such I hold that the plaintiff is only entitled for damages in respect of the 31 crates of plywood as stated in the outward manifest for voyage 2/94 in the sum of RM58,032, together with interest at the rate of 8% per annum from the date of judgment to the date of full recovery.

With respect to cost, I accepted the argument put forward by the learned counsel for the plaintiff that the first plaintiff was made a party to this action as there was uncertainty as to when the right in the plywood passed from the first plaintiff to the second plaintiff. However since the director of the second plaintiff himself admitted that those plywoods already belonged to the second plaintiff upon payment, it may not be necessary for the second plaintiff to commence this action together with the first plaintiff. In the circumstances I only award cost to the second plaintiff to be taxed unless otherwise agreed.